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No. _____

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In The

Supreme Court of the United States

October Term, 1991

DENVER LEE SHUTZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal agents must first secure a search warrant to enter a Fourth Amendment protected structure when, at the time the plan to enter is formulated, there is ample opportunity to obtain a written warrant by a physical appearance before a nearby and readily available United States Magistrate Judge, or, alternately, secure a telephonic extension to a warrant already given by that magistrate two hours previously?

2. Whether a federal law enforcement agent can decide to make an illegal warrantless search into a Fourth Amendment protected structure, and in the process of pursuing that illegal search and entry, thereafter experience an alleged "exigent" circumstance, and then make use of the "exigent" circumstance to justify the otherwise illegal warrantless entry into the structure?

3. Whether probable cause to believe a crime is being committed within a Fourth Amendment protected structure must be first demonstrated and in existence in order to make a warrantless entry on subsequently encountered alleged "exigent circumstances"?

4. Whether the odor of diethyl ether emanating from a structure protected by the Fourth Amendment establishes probable cause to believe a crime is being committed therein?

5. Whether the smell of the legitimate chemical compound diethyl ether converts an illegal warrantless entry into a Fourth Amendment protected structure into a

QUESTIONS PRESENTED – Continued

legal entry on the theory that the illegally entering federal officer has experienced an "exigent" circumstance?

6. Whether illegal visual searches conducted from a vantage position not open to the public by law enforcement officers taints any subsequent evidence obtained and searches done thereafter?

7. Whether petitioner was denied the equal protection of the law as interpreted in a host of cases by the United States Court of Appeals for the Ninth Circuit?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Denver Lee Shutz, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the ruling/opinion entered January 9, 1991, rehearing/suggestion for hearing En Banc denied October 24, 1991.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered its unpublished opinion, *United States v.*

Denver Lee Shutz, on January 9, 1991. A timely petition for rehearing/suggestion for hearing En Banc was denied on October 24, 1991. Copies of these opinions and orders appear in the Appendix.

JURISDICTIONAL GROUNDS

(i) The United States District Court denied a motion to suppress evidence by a written order on December 8, 1988. A copy of that order appears at Appendix A-1.

(ii) The United States Court of Appeals affirmed the conviction and order denying suppression of evidence by an unpublished opinion entered January 9, 1991. A copy of that opinion appears at Appendix B-1.

(iii) The United States Court of Appeals entered an order denying rehearing/suggestion for hearing En Banc on October 24, 1991. A copy of that order appears at Appendix C-1.

(iv) Jurisdiction to review by certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by

oath or affirmation, and particularly describing the place be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

(a) General Facts/Law

This case presents before this Honorable Court the nationally consequential issue whether federal law enforcement officers can decide to make a warrantless search of a Fourth Amendment protected structure when, at the time they decided to conduct that search, they have ample opportunity to secure a traditional search warrant from a United States Magistrate Judge from whom they had, 2 hours previously, secured a standard warrant, or alternately, they have ample opportunity to secure a telephone extension of that warrant from the same United States Magistrate Judge.

Under the set of facts at bar, federal officers were within a private home on the premises and had an operable telephone at arms length, and had continuing access to the home telephone number of the U.S. Magistrate Judge from whom, 2 hours before, they had secured a traditional warrant to enter the private home to search for evidence of violation of Immigration and Naturalization Laws.

The U.S. Magistrate Judge was a mere 10 miles away and it was about 7:30 p.m., i.e. early evening, before the judge presumably had retired for the night, when the

decision was made to search a Fourth Amendment protected barn on the premises, said barn not being provided for in the original search warrant.

In the process of the warrantless search, which commenced after no warrant was sought, allegedly "exigent" circumstances developed because the searching agents discerned the odor of "ether" emanating from the barn.

Many decisions of the United States Court of Appeals for the Ninth Circuit have found that the odor of "ether" does not supply probable cause to believe a crime is being committed at the source of the "ether" odor. *United States v. Warner,* 843 F. 2d 401, 404 (9th Cir. 1988); *United States v. Stanert,* 762 F. 2d 775, 782 (9th Cir. 1985); *United States v. Tate,* 694 F. 2d 1217, 1221 (9th Cir. 1982).

Therefore the detection of "ether" as an "odor" can not, of and in itself, provide "probable cause". At the time the officers in this case decided to make a warrantless search of the barn, no such odor was extant, and the "odor" was encountered only after, and as a result of, the decision to effect a warrantless search of the barn.

After commencing that warrantless search of the barn, which was held by both the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit to be a Fourth Amendment protected structure, the "odor" was detected. Allegedly this "odor" created "exigent" circumstances which, magically and retroactively, is asserted to justify the warrantless search.

At issue secondly is the nationally consequential issue whether such an odor creates "probable cause", and if it does not, whether any "exigency" can be coupled

with the non-existent "probable cause", and, more importantly can federal officers manufacture both "probable cause" and "exigent" circumstances as a result of their own decision to violate the provisions of the Fourth Amendment where, before embarking on the warrantless odyssey, they had opportunity to secure either a traditional warrant or a telephonic warrant? The telephonic warrant would have been an extension of, and to, a standard warrant they had secured a mere 2 hours earlier from a United States Magistrate Judge in Fresno, California, the situs of the United States District Court for the Eastern District of California, allowing a search of only the residence.

This barn, and the home, was owned by petitioner Denver Lee Shutz. The barn contained an operational methamphetamine laboratory. Petitioner Shutz, as a charged "joint venturer", or co-conspirator, and as owner of the premises, had standing to object to its warrantless search which was conducted and completed well before officers went to his personal residence at another location many miles away and sought "consent" from him.

That "consent" is not in issue here and was never contended by the United States to retroactively justify or sanitize the entry and seizure already completed before the "consent" was obtained from the petitioner Shutz; cf. final 2 paragraphs, Appendix A, page A-15, A-16.

(b) Specific Facts

On May 14, 1988, at 5:03 p.m., agents of the Immigration and Naturalization Service obtained a search warrant to search a private residence at 3277 Dinuba Avenue,

Caruthers, California, within the Eastern District of California.

It sought solely items felt to violate the immigration and naturalization laws including "Special agricultural work applications and related papers, documents, records, ledgers, journals, notary stamps and records, a seal embossing or impressing device(s), and any other fruits and instrumentalities which are evidence of the creations and supplying of false writings and documents for use in applications for adjustment of residence status under Title 8 U.S.C. Section 1160".

The search warrant was supported by a lengthy affidavit by Jesus G. Quintanar, Jr., special agent, INS, and the sufficiency of either the warrant or the supporting INS affidavit is not here challenged, nor was it in the District Court.

Specifically, the search warrant and its affidavit charged one Oscar Morales, the occupier of the residence, with violations of 8 U.S.C. 1160, et. al, supplying false documents in support of illegal applications for amnesty and naturalization, alleging documents proving said illegal activity would repose within the residence.

Importantly, no allegation of any drug related offense was ever averred. The warrant was executed circa 7:00 P.M. on May 14, 1988. Upon execution of the search warrant at the front residence at 3277 Dinuba, Morales was found to be absent; during the course of the evening, circa 8:00 P.M., Deputy Jose Flores of the Fresno County sheriff's office inquired of one of the detainees within the home whether Morales engaged in any narcotic activity.

Upon receiving a negative answer, which was followed by the statement that Morales had been admonished that the rear barn was off limits, Flores decided to search the barn. While initially considering waiting until Morales returned, to secure possible "permission" from him, Flores grew impatient and went to the rear edge of the home area, encountering the obstacles secreting the barn from view. Flores and INS Agent Washington encircled the barn into areas not accessible to the public, in defiance of the no trespassing signs and the very high pile of grape bins obscuring the barn, and, on the east side of the barn between a 5 foot-wide pathway of parallel raisin/grape crates, peered into an aperture in the barn wall, noting a Caucasian male and chemical glassware.

On their way to the circumferential odyssey, allegedly diethyl ether odors were detected, but these olfactory perceptions in no way caused Flores to halt his search plans, such as calling a fire department because of potential combustion/explosion of the ether. Flores and Washington awaited the emergence of one Lowe from the barn, pounced on him, and captured him. Thereafter they and one Johnson entered the barn together with a dog and eventually telephonically called drug/fire personnel in their post-search belated efforts to contend that "exigencies" foreclosed the need to secure even a telephonic search warrant. (See Appendix A, opinion/order of District Court denying Rule 41 motion to suppress).

The searching officers recognized that the INS search warrant did not allow search of the barn; however, at no time did they attempt to secure even a telephonic search warrant under the following conditions:

(a) Circa 8:00 P.M. and at all times that they were at the Morales home, a phone was available within the Morales home. They knew it to be functional.

(b) The officers had the search warrant just executed on the Morales abode; it contained 2 inches by 8 inches of *blank area* allowing additional description of the barn to be penned in prior to calling U.S. Magistrate Alan Christensen in Fresno, to approve a telephonic warrant; this same U.S. Magistrate had issued the INS search warrant at the same address only 2 to 3 hours before, 5:03 P.M., in Fresno.

(c) the situs of search was mere 10 miles and 15 minutes from Fresno, allowing obtaining, as well, a written warrant.

(d) not one scintilla of exigency existed when Flores decided to search the barn; no smell of diethyl ether was discernible at or near the Morales home.

In view of all of the above, Flores and his associates elected to neither secure a telephonic search warrant nor to travel the 10 miles to Fresno to secure a second warrant from the U.S. Magistrate. It must be emphasized that this conscious decision to forego the warrant requirement was made early to mid-evening, right outside the metropolitan Fresno area at 8:00-9:00 P.M.

Flores then created his own alleged "exigency" by his premeditated warrantless search into the curtilage of the barn. When doing this Flores knew;

(a) That the INS warrant did not extend to his desired target;

(b) occupants of the home had told him that the "barn" was off limits.

(c) No trespassing signs abounded;

(d) 16 foot high grape crates blocked his view of the barn;

(e) other heavy brush and 2'x4's blocked ingress to the barn's curtilage;

(f) grape orchards surrounded the barn on the east, the south and the west; the grape crates blocked also the east and northern sides of the barn.

The District Court denied a Rule 41 motion to suppress the viewing through the aperture of the barn and subsequent illegally derived fruits on the sole basis that "exigency" was demonstrated and the team could not have secured a telephonic search warrant, paralleling the facts of the case to *United States v. Echegoyen*, 799 F. 2d 1271 (9th Cir. 1986).

As is noted by petitioner infra the facts of the case at bar widely differ from *Echegoyen* both in the consideration of the "exigency" issue and in the issue of whether failure to secure either a written search warrant or a telephonic search warrant violated the Fourth Amendment.

Petitioner Shutz avers the District Court was clearly erroneous in its purported one-to-one congruence of *Echegoyen* with the case at bar; this key error leads to wrong legal conclusions, the latter issues of law reviewable *De Novo* by this Honorable Court.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

1. Where ample time exists to secure a standard search warrant by personal appearance before a U.S. Magistrate Judge, or to obtain a telephonic extension to a standard warrant issued a mere 2 hours earlier, and where no "exigent circumstances" then exist, federal agents must demonstrate probable cause to a neutral and detached magistrate instead of effecting a warrantless search of a structure protected by the Fourth Amendment. If federal agents willfully and premeditatively forego the warrant requirements, subsequently developed "exigent circumstances" arising out of the fruit of the poisonous tree of the original illegal violation of the curtilage of the protected structure cannot sanitize the original illegal entry. *Wong Sun v. United States*, 371 U.S. 471 (1963). The District Court and the U.S. Ninth Circuit fails to recognize this principle. Certiorari should be granted to enunciate and establish this principle on a National basis.

2. The smell of the odor of the fully legitimate and widely used chemical compound diethyl ether does not provide probable cause to believe that criminal activity is the cause or source of that odor. The detection of that odor, without more, emanating from a structure protected by the Fourth Amendment, does not allow a warrantless search of the structure by federal law enforcement agents. The U.S. Ninth Circuit agrees with this principle, (e.g. *United States v. Tate*, 694 F.2d 1217, 1221 (9th Cir. 1982); *United States v. Stanert*, 762 F.2d 775, 782 (9th Cir. 1985); *United States v. Warner*, 843 F.2d 401, 404 (9th Cir. 1988)), but refused and neglected to apply this principle at bar.

Certiorari should be granted to evaluate, and rule, on a National basis, whether the odor of a legitimate, widely used compound emanating from a structure protected by the Fourth Amendment allows a warrantless entry and search of the structure.

Certiorari should be granted, as well, to insure petitioner is accorded the protection of the foregoing authorities of the U.S. Ninth Circuit.

3. Where no probable cause to believe criminal activity exists in a structure protected by the Fourth Amendment, subsequently developed "exigent circumstances" can not permit a warrantless search of that structure.

Although the U.S. Ninth Circuit has recognized this principle in previous published cases (e.g. *United States v. Impink*, 728 F.2d 1228 (9th Cir. 1984); *United States v. Stanley*, 545 F.2d 661, 664 (9th Cir. 1976)) that court failed and refused to recognize this principle at bar.

Certiorari should be granted to establish, on a National basis, that *probable cause* must exist prior to and contemporaneously with any so-called *"exigent circumstances"*, to effect a warrantless search of any structure protected by the Fourth Amendment.

4. The odor of a legitimate chemical compound of wide use, not supplying probable cause to effect a warrantless entry into a structure protected by the Fourth Amendment, can not create an "exigent circumstance" to allow warrantless entry when that odor is detected emanating from the structure.

Certiorari should be granted to establish this principle on a National basis.

5. Illegal visual searches occur whenever law enforcement agents violate the curtilage of a structure protected by the Fourth Amendment and visually peer into the structure from a vantage point not open to the public, and all searches and seizures occurring thereafter violate the Fourth Amendment as fruits of the poisonous tree of the original illegal entry and visual search. *Wong Sun v. United States,* 371 U.S. 471 (1963).

Certiorari should be granted to establish and enunciate this principle.

ARGUMENT

I

WHERE EITHER A STANDARD SEARCH WARRANT OR A TELEPHONIC EXTENSION TO AN EXISTING SEARCH WARRANT MAY READILY BE OBTAINED, FEDERAL OFFICERS VIOLATE THE FOURTH AMENDMENT IN DECIDING TO CONDUCT A WARRANTLESS SEARCH OF A FOURTH AMENDMENT PROTECTED STRUCTURE AND THEREAFTER, AS A RESULT OF THEIR OWN ILLEGAL ACTIVITY, MANUFACTURE ALLEGED "EXIGENT CIRCUMSTANCES", WITH OR WITHOUT PROBABLE CAUSE, SINCE NO EMERGENCY SITUATION CONFRONTED THE OFFICERS WHEN THE DECISION WAS MADE TO CONDUCT THE ILLEGAL WARRANTLESS SEARCH.

As petitioner has set forth in the Statement of the Case, *supra,* INS agents had secured a valid standard

search warrant limited to the search of a residence occupied by one Morales for violations of the Immigration and Naturalization Law from U.S. Magistrate Christensen in nearby Fresno, the situs of the U.S. District Court, Eastern District of California.

After executing it, and being within the home for at least an hour, curiosity got the best of them and a decision was made to effect a warrantless search on a barn on the premises that was secluded from view by grape crates stacked 16 feet high. The barn was also the residence of co-defendant Lowe.

The searching officers recognized that the INS search warrant did not allow search of the barn; however, at no time did they attempt to secure even a telephonic search warrant under the following conditions:

(a) Circa 8:00 P.M., and at all times that they were at the Morales home, a phone was available within the Morales home. They knew it to be functional.

(b) The officers had the search warrant just executed on the Morales abode; it contained 2 inches by 8 inches of *blank area* allowing additional description of the barn/residence of Lowe to be penned in prior to calling U.S. Magistrate Alan Christensen to approve a telephonic warrant in Fresno; this same U.S. Magistrate had issued the INS search warrant at the same address only 2 to 3 hours before, 5:03 P.M., in Fresno.

(c) The situs of search was a mere 10 miles and 15 minutes from Fresno, allowing obtaining, as well, a written warrant.

(d) Not one scintilla of exigency existed when Flores decided to search the barn/residence; no smell of diethyl ether was discernible at or near the Morales home.

In view of all of the above, Flores and his associates elected to neither secure a telephonic search warrant nor to travel the 10 miles to Fresno to secure a second warrant from the U.S. Magistrate. It must be emphasized that this conscious decision to forego the warrant requirement was made early to mid evening, right outside metropolitan Fresno area at 8:00-9:00 P.M.

Flores then created his own alleged "exigency" by his premeditated warrantless search into the curtilage of Lowe's residence, i.e., the barn. When doing this Flores knew:

(a) That the INS warrant did not extend to his desired target;

(b) Occupants of the home had told him that the "barn" was off limits;

(c) "No trespassing" signs abounded;

(d) 16 foot high grape crates blocked his view of the barn;

(e) Other heavy brush and 2'x4's blocked ingress to the barn's curtilage;

(f) Grape orchards surrounded the barn/Lowe residence on the east, the south and the west; the grape crates blocked also the east and northern sides of the barn (See, diagram of premises, page 24).

The INS search team had, therefore, full opportunity under then non-exigent conditions to secure either a written second search warrant, or, alternately, a telephonic search warrant at circa 8:00 P.M. under the following conditions:

(a) A mere 3 hours earlier, U.S. Magistrate Christensen had issued a written search warrant, the original and copies of which were in the possession of the search team at 3277 Dinuba, Caruthers;

(b) Caruthers was a mere 10 miles and 15 minutes from Fresno;

(c) A telephone was instantly available, and had already been used by the officers in the searched home;

(d) Searching officers recognized the INS warrant did not extend to the rear barn/residence, a separate curtilage;

(e) Searching officers made no effort to secure either warrant but elected to search without a warrant.

In view of the preference for securing of a search warrant, the United States can not take advantage of any alleged "exigent circumstance" that did not exist and was not known at the time decision was made to effect entry into the barn.

As noted in both Appendix A and Appendix B, the District and Circuit Courts have ruled that petitioner Shutz had a reasonable expectation of privacy in the barn, and that issue is not before this Honorable Court. *Cf. United States v. Dunn*, 480 U.S. 294 (1987).

II

THE ODOR OF ETHER, OR DIETHYL ETHER, EMANATING FROM A STRUCTURE PROTECTED AGAINST WARRANTLESS SEARCHES BY THE FOURTH AMENDMENT DOES NOT PROVIDE PROBABLE CAUSE TO BELIEVE THAT CRIMINAL ACTIVITY IS OCCURRING WITHIN THAT STRUCTURE.

The United States Court of Appeals for the Ninth Circuit has held that the odor of ether, or diethyl ether, emanating from a structure, does not supply probable cause to believe criminal activity may be the cause of the odor.

As early as *United States v. Tate,* 694 F.2d 1217, 1221 (9th Cir. 1982) a panel of that Circuit ruled:

> "The unknown informant did not state that the illegal manufacture of PCP, or any other illicit activity was taking place at the Avenue 320 residence. The sole facts presented in the affidavit suggesting criminal activity at the residence were (1) the premises emitted a strong odor of ether, and (2) the process of manufacturing PCP emits a strong odor of ether. Appellants contend that the smell of a non-contraband substance having a number of legitimate uses, standing alone, does not establish probable cause to search a residence. We agree. Ether has many innocuous uses. It is a very common solvent, and is also used to start engines. While the strong smell of ether may be a factor in establishing probable cause, the government cites no case, and we have found none, holding that the smell of ether, without more, establishes probable cause to search."

* * *

> "Because ether has several legitimate uses, its odor is not sufficiently distinctive to identify the manufacturing of PCP . . . "

Thus, in *Tate,* a *warrant* was nullified even though a magistrate had approved it.

At bar, of course, no warrant was even sought, although ample time existed, when federal agents decided to search the barn, prior to even experiencing the odor.

The Tate panel's reasoning was continued in *United States v. Stanert,* 762 F.2d 775, 782 (9th Cir. 1985).

In *Stanert,* in striking down the search *by warrant* of the residence, which contained in the supporting affidavit other allegations of drug manufacture, the panel stated:

> " . . . The only additional material in the affidavit suggesting criminal activity at the residence was (1) the reports of two anonymous citizens that Stanert's residence was emitting ether fumes, (2) the corroboration of the odor by Hanlon and another agent and (3) the statement by Hanlon that ether is a solvent used in the preparation of several illicit substances, including cocaine. Ether, however, is a non-contraband substance having a number of legitimate uses. *United States v. Tate,* 694 F.2d 1217, 1221 (9th Cir. 1962) . . . It is a very common solvent and is also used to start engines."

The pendulum swung the other way in *United States v. Echegoyen,* 799 F.2d 1271 (9th Cir. 1986) where the smell of ether was said to support a warrantless search under the following unique conditions:

(a) In *Echegoyen,* the police arrived in the middle of the night with no search warrant; at bar they arrived around 7:30 P.M. armed with a search warrant under INS auspices; the "late night hour" confronted the *warrantless Echegoyen* officers, an early evening *warrant* situation was the hallmark of the case at bar.

(b) In *Echegoyen,* a "remote Idyllwild area" was presented, the officers were "forty to forty-five minutes from their station", and without saying, likely had no phone access. In dire contrast officers were here 15 minutes and 10 miles from Fresno (See E.R. 37a, b, pages 91-92, suppression transcript, lines 20-25) at evening hours, with full access to a working telephone right in the Morales home, i.e., the home searched under INS search warrant auspices (See E.R. 37b, page 92, lines 1-15, suppression transcript).

Here, in dire contrast to *Echegoyen,* where the district courts *findings of fact* indicated "the officers did not have the necessary form" to get a telephonic warrant," (E.R. 56, lines 17-26, opinion), the officers *never even considered* getting a warrant, and it is clear that they already had the facsimile warrant specifying the address 3277 Dinuba; see E.R. 14. All that they would have had to do would be to *add* the additional scope that they now wished to invoke; a search of the barn; indeed, a clear 2 inches of *blank space* appears in the existing warrant. A readily available telephone call to Magistrate Christensen, who executed the existing warrant at 5:03 P.M. that date of May 14, 1988, would readily have allowed the proper search around 9 to 10:00 P.M., a mere 4 to 5 hours later.

Indeed, these police wilfully created their own exigency by illegally searching *prior* to discovering or mentally conjuring up the emergency, and never intended to secure a search warrant.

In *United States v. Warner,* 843 F.2d 401, 404 (9th Cir. 1988) the 9th Circuit returned to the usual rule that the presence of ether, even when accompanied by a list of other known chemicals (phenyl-2-propanone, i.e., "P2P", formaldehyde, acetic anhydride, and methylamine) did not provide, with chemical odors abounding from the structure on a hot day, a basis for believing that "any illicit activity was actually taking place on the premises", i.e., no probable cause was demonstrated.

These odors did not create "exigent circumstances" to allow *warrantless* entry; *United States v. Echegoyen,* was noted, and was distinguished. (843 F.2d 401, 403-404).

Therefore, the law of the U.S. Ninth Circuit finds no probable cause to effect a search of a structure protected by the Fourth Amendment solely because the odor of "ether" emits therefrom.

Absent probable cause, no "exigent circumstances" can be asserted.

United States v. Crozier, 674 F.2d 1293, 1298 (9th Cir. 1982) (Judges Goodwin, Tang of that Circuit) as did the U.S. District Judge (J. Cordova, D. Arizona) found no probable cause existed to believe that controlled substances would be located within the residence, and that *no exigent circumstances existed to justify a warrantless entry* (no danger of destruction of evidence).

Plainly, *only if* it can be said that *all* users of diethyl ether create inherently explosive dangerous conditions allowing a law enforcement officer who might smell diethyl ether to enter without a warrant, shut it down, and search the premises, can a federal panel conclude that a smell of "ether" creates an "exigency" and that, of course, simply is not so. That line of "reasoning", carried to this extreme, would subject hospitals, veterinary clinics, machine shops, gas stations, and *any other place* where diethyl ether is smelled, to an immediate *warrantless entry* on some sort of "exigency".

Such cannot be, and is not, the rule. Moreover, there is no *discernible reason* to suggest that an unknown user of ether for an unknown purpose does not have it under control as it is being then used, to cause "physical harm to police officers" who have then no right to be embarking on a warrantless, planned search, or to ethereal "other persons". *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984).

The panel decision attempts to justify the "exigency" by *what is later turned up*, rather than what officers knew before their illegal visual peering into the barn given Fourth Amendment protection by *both the District Court and the 9th Circuit panel*. This the panel cannot do; see *United States v. Warner*, 843 F.2d 401, 403:

> "Exigencies must be viewed from the totality of circumstances *known to the officer at the time of the warrantless intrusion* . . . the reason behind assessing exigency from the circumstances *known to the officer at the time of the search* lies in the purpose underlying the fourth amendment . . . "

Therefore, the *only* factor known to officers as they crossed onto the protected curtilage of the barn given Fourth Amendment protection by the Ninth Circuit panel was a smell of "ether", which of and in itself cannot and does not suggest it to be out of control by its user to create some sort of "exigency" so as to allow *warrantless entry*. To repeat, the smell of ether provides no probable cause to believe criminal activity is afoot in the structure.

III

ABSENT PROBABLE CAUSE EXISTING TO SEARCH A STRUCTURE PROTECTED BY THE FOURTH AMENDMENT, NO SO-CALLED "EXIGENT CIRCUMSTANCES" CAN ALLOW A WARRANTLESS SEARCH THEREOF. CERTIORARI SHOULD BE GRANTED TO ENUNCIATE, ON A NATIONAL BASIS, THE PRINCIPLES COUPLING "PROBABLE CAUSE" AND "EXIGENT CIRCUMSTANCES".

The U.S. Ninth Circuit has previously ruled that "exigent circumstances" must be coupled with *probable cause* in order to effect a warrantless search of a Fourth Amendment protected structure.

In *United States v. Impink*, 728 F.2d 1228, 1231, a panel concluded

> "The mere suspicion that evidence may be present does not justify entry by the police; rather there must be a finding of *probable cause* coupled with *exigent circumstances*".

See also, United States v. Stanley, 545 F.2d 661, 664 (9th Cir. 1976), where the 9th Circuit ruled:

> "As a fundamental rule, 'searches conducted outside the judicial process without prior

> approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions': *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). *One such exception is the finding of probable cause coupled with exigent circumstances.* In this case, our holding as to probable cause makes it unnecessary to reach the issue of exigent circumstances."

(No probable cause demonstrated, therefore, no "exigent circumstances", but search upheld as a customs search requiring no probable cause.)

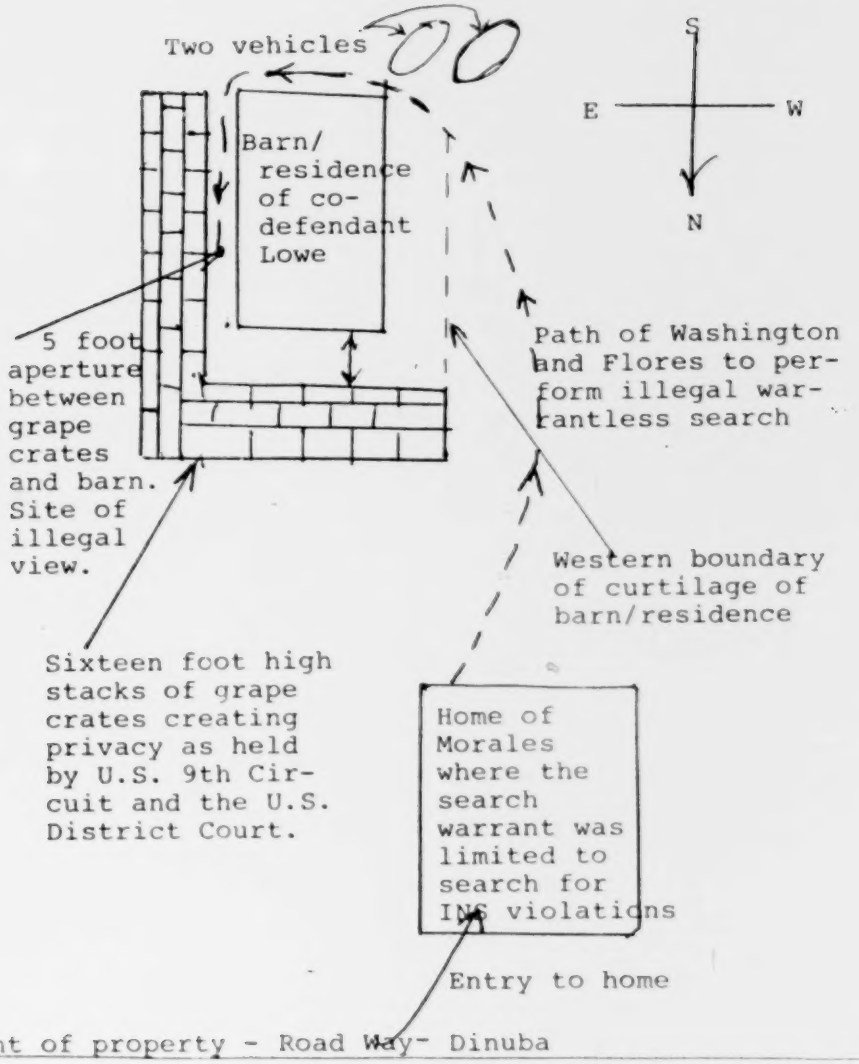
The learned commentator on the Fourth Amendment, Professor Wayne R. La Fave of the University of Illinois, makes clear in his monumental treatise of the Fourth Amendment that "exigent circumstances" cannot exist absent *probable cause.* See La Fave, Search and Seizure, Vol. 2, Section 6.5(b), pages 656 ff, citing specially and analyzing in depth *United States v. Rubin*, 474 F.2d 262 (3rd Cir. 1973).

Therefore, Certiorari should be granted to elucidate, on a National basis, for both state and federal criminal litigation, that so-called "exigent circumstances" may not be invoked *absent accompanying probable cause,* in issues concerning the Fourth Amendment to the United States Constitution.

IV

THE VISUAL SEARCH OF THE RESIDENCE/BARN AT THE SECLUDED EAST SIDE APERTURE, AN AREA NOT ACCESSIBLE TO THE PUBLIC, MADE WITH OUT A SEARCH WARRANT, KNOWING THE EXISTING INS SEARCH WARRANT TO BE INSUFFICIENT, WAS ILLEGAL; IT WAS MADE AT A TIME BEFORE THE RESIDENCE/BARN WAS DEEMED TO BE HAZARDOUS, AND THE OFFICERS CREATED THEIR OWN EXIGENCY.

Initially it must be noted that the existing INS search warrant used to search the residence "would not have supported a search of the barn" and Fresno County Deputy Sheriff Flores was aware of this. (Appendix A-4, lines 16-21 inclusive).


Two vehicles
S
E
W
N
Barn/ residence of co-defendant Lowe
5 foot aperture between grape crates and barn. Site of illegal view.
Path of Washington and Flores to perform illegal warrantless search
Western boundary of curtilage of barn/residence
Sixteen foot high stacks of grape crates creating privacy as held by U.S. 9th Circuit and the U.S. District Court.
Home of Morales where the search warrant was limited to search for INS violations
Entry to home
Front of property - Road Way- Dinuba

SCHEMATIC DIAGRAM OF 3277 DINUBA, Rural Carruthers, Eastern District of California.

Flores and Washington began their circumferential traverse of the residence/barn, at all times treading in areas not open to the public, and into areas which were obviously blocked out by stacks of raisin bins and brush and No Trespassing signs, by travelling south on the west side of the barn, thence east on the southside (rear) of the barn, and finally travelling north in a 5 foot wide passage between the 16 foot high raisin bins and the east side of the barn. During this travel neither were concerned with "ether explosions" and they were not abandoning their illegal search plans to await the arrival of firefighters, which had not been then notified. Nothing save the odor of ether existed and that would not support the existence of a clandestine laboratory; c.f. *United States v. Tate*, 795 F. 2d 1487 (9th Cir. 1986); *United States v. Landis*, 726 F. 2d 540 (9th Cir. 1984); *United States v. Stanert*, 762 F. 2d 775 (9th Cir. 1985), all of which show additional indicia are needed to secure a search warrant.

Flores and Washington performed an illegal visual search through an aperture on the east side of the barn, noting the presence of "a Caucasian male and chemical glassware", culminating in the racially oriented conclusion that a methamphetamine lab was extant since only "blacks and Mexicans" made PCP, whereas whites made methamphetamine. (Appendix A-5, lines 8-12).

This visually viewing into the barn from a position not open to the public constituted an illegal search made under non-exigent conditions, and after this illegality all other steps taken were fruits of the poisonous tree per *Wong Sun v. United States*, 371 U.S. 471 (1963). The District Court so recognized.

It is evident that this illegal warrantless view obtained from a vantage point not open to the public and thus illegally occupied by police taints ab initio the subsequent police activities and may be struck down under the Fourth Amendment.

It is, of course, here true that the "barn" was not in fact a "barn", but was, as well, the residence of John Otis Lowe with agreement of Petitioner Shutz, the owner, literally a co-conspirator in the synthesis venture. A residence occupied for illegal purposes of methamphetamine manufacture is no different than a residence free of illegalities for Fourth Amendment purposes. *United States v. Pollock*, 727 F. 2d 1456 (9th Cir. 1984).

It is clear that a key distinction exists in the law based on observations of visual or audio nature made from a position where a police officer has *a right to be* vis-à-vis from a position that he *does not have a right to be*, i.e., if the observation is made from a position where the public may logically traverse, no violation occurs. See, e.g., *People v. Wright*, 41 Ill. 2d 170, 242 N.E. 2d 180 (1968), where the officer so employed his senses of sight and hearing while standing on the nearby railroad right-of-way, an apparent public area. Similarly, if the next-door neighbor could readily observe from the adjacent property, no violation occurs if the police secure permission from the neighbor to view defendant's premises, and the discovery is made therefrom. See, e.g., *Commonwealth v. Busfield*, 242 Pa. Super. 194, 363 A. 2d 1227 (1976). However, when police surveillance takes place at a position which cannot be called a "public vantage point", i.e., when police resort to the extraordinary step of positioning themselves where neither neighbors nor the general

public would ordinarily expect to be, the observation of, or overhearing, what is occurring within constitutes a Fourth Amendment search. See, e.g., *Pate v. Municipal Court*, 11 Cal. App. 3rd 721, 89 Cal. Rptr. 893 (1970).

The well-reasoned California Supreme Court opinion in *Lorenzana v. Superior Court*, 9 Cal. 3rd 626, 108 Cal. Rptr. 585, 511 P. 2d 33 (1973) is highly illustrative. There police left the sidewalk to go to the side of the home where no defined pathway existed nor were there any indicated doors of entry, and peered beneath a small opening below the drawn shade to hear and observe a narcotics transaction.

> "The fact that apertures existed in the window, so that an unlawfully intruding individual so motivated could spy into the residence, does not dispel the reasonableness of the occupants' expectation of privacy . . . To the contrary, the facts of this case demonstrate that by drawing the window shade petitioner Lorenzana exhibited a reasonable expectation to be free from a vantage point in the surrounding property not open to public or common use. Surely our state and federal Constitutions and the cases interpreting them foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, airproof box."

Here, at bar, police encircled Petitioner's barn, the residence of Lowe, finally making forbidden observations at its eastern side while occupying the 5 foot wide passage between raisin crates and barn/residence wall. Such area, of course, was *not* accessible to the public in the

normal course of public life styles such as newspaper deliveries or a reception path for visitors or salesmen or purveyors of Girl Scout Cookies; while it is not a search to observe from a public sidewalk (e.g., *United States v. Hanrahan*, 442 F. 2d 649 (7th Cir. 1971) or an alley (e.g., *United States v. Wright*, 449 F. 2d 1355 (D.C. Cir. 1971); *Bruce v. State*, 268 Ind. 180, 375 N.E. 2d 1042 (1978)), such was not the case at bar where police occupied the narrow passageway between the high crates and the east barn/residence wall. Because Petitioner clearly sought to protect the barn/residence from viewing by the public, precluding the public from entering by "No Trespass" signs and admonitions to Moreno and his family, and by the surrounding of the barn/residence by raisin crates and brush and natural grape orchards, Fourth Amendment protection was afforded by both the District and 9th Circuit Courts.

This structure and its environs could not be considered "open fields", and the District Court did not so treat it. Cases illustrative are many: *Norman v. State*, 379 So.2d 643 (Fla. 1980) (it is a search for officer to climb fence to which gate locked and then look into barn; privacy expectation justified because defendant "took overt steps to designate his farm and barn not open to the public"; the "barn, an integral part of petitioner's farming business, enjoyed the same Fourth Amendment protection as do other business premises"); *Huffer v. State*, 344 So.2d 1332 (Fla. App. 1977) (officers walked through side yard to back yard and shined light through small tear in plastic cover of hothouse and saw marijuana plants inside; held, "(u)nder either the traditional curtilage approach or the

more contemporary reasonable expectation of privacy approach, the appellant's hothouse was deserving of constitutional protection"); *Gonzalez v. State*, 588 S.W. 2d 355 (Tex. Crim. App. 1979) (it is a search when officer deviated from normal route of visitor on property to peek into outdoor toilet near dwelling); *State v. Daugherty*, 94 Wash. 2d 263, 616 P. 2d 649 (1980) (it is a search to look into garage where defendant had backed up 2 trucks to open garage door to block view and officer went between the trucks, beyond that part of the driveway which was a pathway to the house to gain view).

The officers here making their observations from the narrow 5 foot wide passage between the eastern wall of the barn and the stacks of raisin crates, (see figure, supra, page 24, this petition) encroached upon an area not accessible to the public and an area clearly one that Petitioner sought to protect as private.

As such the initial visual search of the barn/residence was illegal, and all other matters stemmed therefrom as illegal fruits of the poisonous tree, pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

To resolve serious and National scope issues in Fourth Amendment protection, raised in this Petition, Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated: December 18, 1991 at Santa Ana, California.

Respectfully submitted,

/s/ Roger S. Hanson

ROGER S. HANSON
Member of the Bar
United States Supreme Court
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN ODIS LOWE, DENVER LEE SHULTZ [sic] and DOUGLAS LOWE, Defendants.	CR F-88-94 EDP MEMORANDUM DECISION RE: DEFENDANTS' MOTION TO SUPPRESS EVIDENCE (Filed Dec. 8, 1988)

A superseding indictment was filed against the above named defendants on July 21, 1988. All three defendants are charged in Count I with conspiracy to manufacture a controlled substance, namely methamphetamine. Count II charges all three defendants with manufacturing and aiding and abetting the manufacture of a controlled substance, namely methamphetamine. Count III charges defendant Denver Lee Schultz [sic] with maintaining a place for the manufacture of methamphetamine.

Defendant John Lowe has filed a motion to exclude evidence consisting of the fruits of the search of a certain barn adjacent to the premises known as 3277 Dinuba Avenue, situated in the rural area surrounding Caruthers, California. Defendant Denver Lee Schultz [sic] has filed a motion to suppress the evidence seized from a search of the barn which was allegedly made with his consent.

THE SCENE

Prior to the commencement of the hearing, the parties stipulated that defendants' Exhibit "A" was a scale drawing of the scene where much of the relevant activity occurred. Accepting the stipulation as binding on the parties, the Court notes that the residence known as the "Morales residence", which was the object of the execution of the unrelated search warrant, lies eighty (80) feet south of the roadway known as Dinuba Avenue. Southeasterly of the southeast corner of the house was a tank house which formed the western edge of the barricade that had been erected across the driveway between the house known as 3277 Dinuba Avenue and the adjacent house facing Dinuba Avenue. There was a row of fruit bins arranged in the configuration of an "L" and consisting of two (2) or three (3) rows deep, 207 feet from Dinuba Avenue. Each row of bins was at least sixteen (16) feet high. The configuration was such that it shielded the barn from view, except the very top of the barn. The barn lay south and west of the bins.

The roadway that led to the barn area on the westerly side of the Morales residence, was blockaded by a pile of trash. There was an access road on the east side of the common dwelling area which was not blocked and apparently had been used by the vehicles that were parked to the rear of the barn at the time of the warrantless search. In the photos, the normal access road in the center of the common area between the Morales residence and the adjacent residence was barred by a hand-built barricade containing "No Trespassing" signs. Thus the access to the barn was blocked except for the access road situated on the extreme west side of the property. The barn was

partially shielded from view by the bins if this access was used by a person approaching the barn.

BACKGROUND FACTS

On May 14, 1988, a task force of federal immigration agents and Fresno sheriff's personnel, executed an immigration search warrant on the premises known as 3277 Dinuba Avenue. These premises were alleged to have been occupied by one Morales. The warrant pertained to illegal immigration activities.

The government produced two (2) witnesses who were part of the search team, namely John J. Washington, an agent with the Immigration and Naturalization Service, and Jose Flores, a Fresno County Deputy Sheriff.

The Court finds that much of the testimony as to actions observed by Agent Washington could not physically have been observed by him. Accordingly, the Court gives no credence to Agent Washington's testimony. The Court has not relied, in whole or in part, upon Agent Washington's testimony in framing this tabloid of background facts.[1]

On May 14, 1988, Flores had been assigned as a narcotics detective for approximately nine (9) months.

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[1] Since dictating the original draft of this memorandum decision, the attorney for the government, by letter, has attempted to "strike" Agent Washington's letter [sic, testimony]. Counsel for the defendant has objected by letter. Since the Court had previously decided that Agent Washington's testimony was not credible, the Court need not act upon the request to strike the testimony of Agent Washington.

Flores' specific assignment with regard to the Morales raid was to serve as an interpreter for suspects that spoke Spanish and to drive the surveillance van, which was needed in the operation.

They arrived at 3277 Dinuba Avenue at approximately 7:00 p.m. on May 14, 1988. Flores questioned the persons found in or about the target premises. One person that Flores questioned denied any knowledge of narcotics activity. However, the subject did indicate that his boss Morales had prohibited him from going to the barn behind the house. Flores accurately testified that from the observations he made of the back area, he could only tell that there was a structure in the rear. It was Flores' original intention to seek the consent of Morales to search the barn.

Since Morales' arrival was delayed, Flores undertook to approach the barn with the purpose of determining if anyone was in it. Clearly, the search warrant under which they were proceeding would not have supported a search of the barn, and Flores knew this. As Flores rounded the stack of bins that affectively, [sic] shielded the barn from observation by anyone at the house or in the common yard adjacent thereto, he noticed a light and shadows through the cracks in the barn wall. Simultaneously, he detected a faint odor of ether. He thereupon determined to make further investigation of the barn and its possible occupants.

Flores continued to approach the barn in the company of Agent Washington. As he walked closer to the barn, the smell got stronger. This caused his initial inquiry to heighten to the point of being suspicious that a

clandestine laboratory was somewhere in the area. Flores and Washington continued until they reached the easterly side of the barn where the cracks between the siding boards were sufficiently pronounced to allow them to see a portion of the interior of the barn. Looking through the cracks, Flores identified a white male in the interior of the barn. He also saw glassware which is commonly associated with clandestine laboratories. He concluded that the laboratory was designed to manufacture methamphetamine, because of the white male, rather than blacks or Mexicans, who are usually associated with the production of PCP.

The radio that Flores was carrying created a noise that attracted the attention of the occupant of the barn. After the noise ceased, the occupant walked to the southeast side of the barn where there appeared to be a door. The occupant finally exited the barn and Flores asked him what he was doing. He answered, "You know what I was doing".

Although Lowe's ambulatory progress had been restrained by Flores and Washington, they had no handcuffs. Flores radioed for a deputy to arrive and place cuffs upon Lowe. Lowe was handcuffed and placed inside Deputy Johnson's patrol vehicle.

Deputies Flores, Washington and Johnson, accompanied by a police dog, then went inside to secure the barn and to make certain there were no other persons in the barn. They observed the glassware they had seen through the cracks that contained various solutions. There was spillage of some kind of liquid on the ground and other chemical containers in the barn.

Having determined that he had probably discovered a methamphetamine lab, Flores called for Sergeant Huerta. Sergeant Huerta instructed them to evacuate the area and to clear everybody out within a half-mile radius.

In response to Flores' call, Huerta arrived at the scene at approximately 10:00 p.m. He contacted Flores and was briefed on what had occurred prior to the arrest of Lowe. Huerta contacted defendant Lowe in the residence where he was being detained. Huerta told Lowe that he felt it was permissible to ask questions concerning the danger the lab presented to the immediate vicinity and the environment without the necessity of a *Miranda* warning. However, he directed Detective Flores to give Lowe his *Miranda* rights and Detective Flores did so in Huerta's presence. Defendant Lowe then indicated that he would speak to the officers. Upon defendant Lowe's inquiry as to whether these statements could be used against him, he was advised that they could. Lowe then proceeded to explain some of the chemical processes that were going on within the barn.

Sergeant Huerta then contacted the special laboratory team from the California State Bureau of Narcotics and the Drug Enforcement Administration to enter the barn and control any reaction that might be found in progress. Sergeant Huerta reiterated his order that the immediate area be evacuated and that a half-mile radius around the structure be cordoned off to prevent cars from entering. Huerta did not seek a telephonic search warrant.

Agent Sherrington of the Drug Enforcement Administration, who was then acting as a supervisor of the clandestine laboratory task force located in Fresno,

arrived at the scene at approximately 10:45 p.m. He met Sargeant [sic] Huerta outside the residence. Under his supervision, Special Agent Oules of the California Bureau of Narcotic Enforcement and Detective Greg McClung of the Fresno County Sheriff's Office, suited up and made an entry into the barn to do a hazard assessment. Nothing was removed from the barn during this hazard assessment. The hazard assessment team reported their findings and [sic] at approximately 12:30 p.m. The chemist then entered the building and stablized [sic] the situation. They did not feel there was any real hazard after they had concluded this work.

Based upon information they received from Mrs. Morales, they determined to secure a consent to search the premises from Mr. Schultz [sic], the owner of the property. Mrs. Morales stated that approximately three (3) weeks prior to that time, Mr. Schultz [sic] had instructed her and her husband that no one was to go near the barn. That at about the same time, Schultz [sic] erected a barricade of fruit bins to obscure the view of the barn from the street. He also put up the barricade between the tank house and the fence of the adjoining residence and piled brush and tree limbs on the driveway to the west of the house, blocking entry from that point.

Drug Enforcement Agent Miller has been with the Agency approximately fourteen (14) months. He testified that he went to the Schultz [sic] home at approximately 1:10 a.m. on May 15th. He asked Schultz [sic] for consent to search the premises. He obtained Schultz's [sic] signature to a consent to search form used by the government. Thereafter, the search was undertaken and the contents of the barn and inventory were seized.

DEFENDANT LOWE'S MOTION TO EXCLUDE EVIDENCE

First we examine Lowe's standing to object to the search.

The law is clear that during the time the cooking operations were in effect, Lowe basically used the barn as his residence. Lowe testified that the only purpose for his presence in the barn was to engage in the illegal activity of cooking methamphetamine. In that respect, the case is not unlike that of *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984):

> Legitimate presence on the premises is still relevant to, although not a talisman of, a legitimate expectation of privacy. *Rakas*, 439 U.S. at 142-43, 99 S.Ct. at 429-30. For example, in *United States v. Robertson*, 606 F.2d 853 (9th Cir. 1979), the court found that the defendant had such an expectation in a friend's residence where he was an overnight guest, kept possessions, and had an interest in the items seized. *Id.* at 856 n.2, The record in this case shows that Pollock's activities in the Smith house and his interest in the laboratory met the *Robertson* criteria. The stipulated facts established that since early 1981 Pollock and other defendants had moved their laboratory from place to place to avoid detection, that Pollock had participated in moving the equipment and chemicals that comprised the laboratory to the Smith residence, and that he used that site to manufacture significant quantities of methamphetamine. In addition, the police affidavit for the search warrant attests that the suspicious activity by the defendants in the Smith

> residence took place during the late night and early morning hours. Moreover, the record show [sic] that Pollock was arrested on the premises.
>
> In addition, a defendant who enters into an arrangement that indicates joint control and supervision of the place searched may challenge a search of the place where contraband is concealed. *See, e.g., United States v. Johns*, 707 F.2d 1093, 1099-1100 (9th Cir. 1983) (airplane pilots who dropped off marijuana bales and then departed had standing to object to later search of truck carrying bales); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (defendants in car who followed truck containing contraband had reasonable expectation of privacy in truck). We find that because of his arrangement with Sissie Smith, and his activities in and presence on the premises at the time of the search, Pollock has met his burden of showing a reasonable expectation of privacy in the Smith residence.

Clearly, from the facts of the cases cites [sic], defendant's presence in the place searched is solely for illegal purposes. However, that fact does not destroy defendant's standing to object to the warrantless search.

We next examine the territorial limits of defendant's expectation of privacy.

As pointed out under the summary of operational facts, substantial efforts were made to seal off the barn from the adjacent premises. First the barn could be approached by three (3) passageways, two (2) of which were barricaded either by a handmade barricades [sic] with a "No Trespassing" sign or by a pile of brush. The barn was further protected by the placement of the raisin

bins on two (2) sides of the barn. Further, the occupants of the Morales home, which was the subject of a legitimate search pursuant to a warrant, had been warned not to go near the barn three weeks before. In the Court's opinion, the approach by Flores to the edge of the bins where he had, for the first time, an unobstructed view of the barn, did not encroach upon Lowe's expectation of privacy. Stating it in another way, the curtilage of the barn did not extend beyond the bins. Hence, any observations made by Flores as he rounded the bins must be examined in order to determine whether that observation was sufficient to justify the balance of Flores' activity.

In *United States v. Dunn*, 94 L.Ed.2d 326, 334-35, the Supreme Court announced an analytical formula to be used in determining the curtilage.

> Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. *See California v. Ciraolo*, 476 U.S. ___, ___, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986) (Powell, J., dissenting) (citing *Care v. United States*, 231 F.2d 22, 25 (CA10), *cert. denied*, 351 U.S. 932, 1001 [sic] L.Ed.2d 1461, 76 S.Ct. 788 (1956); *United States v. Van Dyke*, 643 F.2d 992, 993-994 (CA4 1981)). We do not suggest that combining these factors produces a finely tuned

> formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the [sic] are in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection. Applying these factors to respondent's barn and to the area immediately surrounding it, we have little difficulty in concluding that this area lay outside the curtilage of the ranch house.

The barn was located ninety-two (92) feet from the Morales house, which was the subject of the search by warrant. On the north side of the barn, the bins were located twenty-two (22) feet from the bins [sic, barn]. On the east side of the barn the bins were piled five (5) feet from the barn. Unlike *Dunn*, the arrangment [sic] of the bins clearly indicates that the person who placed the raisin bins there sought to segregate the barn from the rest of the area. Not only was the barn physically separated from the premises, efforts had been made to isolate the barn from the normal activities of the occupants of the houses in front of the barn.

Unlike *Dunn*, the investigative officers had no objective data indicating illegal activity at the side of the barn. The data was entirely subjective. It was based on the odor coming from the barn.

In *United States v. Tate*, 795 F.2d 1487, 1491 (9th Cir. 1986), footnote 5., Judge Enright, speaking from the majority of the panel, outlined the use of an ether smell to

establish probable cause for the issuance of a search warrant.

> In this court's prior decision, the majority of the panel held that the smell of ether, 'without more,' is insufficient to establish probable cause. The dissent, however, analyzed the totality of the circumstances presented in the warrant and concluded that the smell of ether along with the other relevant factors sufficed to establish probable cause.
>
> Two more recent decisions in this circuit further suggest that there is some disagreement among thoughtful and competent judges in determining what factors support a finding of probable cause in methamphetamine cases. In *United States v. Landis*, 726 F.2d 540, 542-43 (9th Cir.) *cert. denied*, 467 U.S. 1230, 104 S.Ct. 2688, 81 L.Ed.2d 882 (1984), an affidavit was sufficient to establish probable cause because the informant believed methamphetamine was being manufactured at the Landis residence and she had seen 'glassware which [she] knows is used for the manufacture of methamphetamine.' In *United States v. Stanert*, 762 F.2d 775, 779 (9th Cir.) *modified*, 769 F.2d 1410 (1985), probable cause for a search warrant was establised [sic] by the affiant's statement that he smelled ether and knew that a methamphetamine lab had exploded on the premises one year earlier. Thus, it would appear that the sufficiency of the probable cause determination in methamphetamine cases requires careful examination of the facts and the totality of the circumstances in each case. And, it would appear that the judges reviewing these determinations frequently reach differing conclusions.

In *United States v. Echegoyen*, 799 F.2d 1271, 1273-74 (9th Cir. 1986) the Ninth Circuit held that the following facts constituted exigent circumstances upon which a warrantless search could validly occur.

> At approximately 12:30 a.m. on May 21, 1983, Jim Jacobson, a resident of Tahquitz Road, was awakened by what he thought to be the odor of a chemical. Jacobson noticed that the odor was coming from the outside air. He then notified the Riverside County Sheriff's Office, and two officers responded to the call. These officers met Jacobson on Tahquitz Road, approximately one-eighth of a mile from Jacobson's house. Jacobson and the officers walked back up the road to Jacobson's house. While walking back to the house, one of the detectives recognized the smell as that of ether.
>
> The officers determined that the smell was emanating from the residence located at 25050 Tahquitz Road. The deputies suspected that this house, in addition to being a fire hazard, was also the scene of illicit narcotics activity. With this in mind, the officers called a back-up deputy and the local fire department to the scene. The firefighter who arrived believed that the fammable [sic] ether posed a serious fire hazard and that immediate actioni [sic] was necessary.
>
> Thereafter, the deputies, without the aid of the firefighter, approached the house and entered through the open sliding glass doors.

Later in *Echegoyen, supra,* at 1278, 1279, 1280, the court more fully explained its reasoning as follows:

> The record in this case establishes that the existence of an explosive fire hazard and the

possibility of illegal drug activity were exigent circumstances that justified the initial warrantless entry. The deputies' testimony as to chemical smell, the activity in the cabin, the early-morning hour, the remoteness of the Idyllwild area, and the limited availability of firefighting resources all justify the initial entry. Consequently, the contention that the alleged exigency was a mere pretext to avoid the warrant requirement is without merit. A bona fide exigency did exist. This conclusion is buttressed by the behavior of the officers upon entering the dwelling. Immediately after serving the defendants and assuring themselves there were no other suspects on the property, the deputies proceeded to reduce the hazards of fire and explosion. They turned off the burners, ventilated the premises, and summoned the firefighters to inspect the property. Finally there is no merit to Echegoyen's contention that the officers should not have entered with their guns drawn. The possible danger of confronting armed suspects in the late evening, without familiarity with the layout of the house, and without knowing the number of suspects present justified the use of the weapons. Accordingly, exigent circumstances were present to justify the initial entry.

This court's inquiry, however, is not yet complete. 'Exigent circumstances alone . . . are insufficient as the government must also show that a warrant could not have been obtained in time.' *United States v. Good*, 780 F.2d 773, 775 (9th Cir.), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1523, 89 L.Ed.2d 920 (1986). Inclusive in this mandate, the government must also be prepared to show that a telephonic warrant was unavailable or impractical. *Id.* at 775; *United States v. Manfredi*,

722 F.2d 519, 523 ((9th Cir. 1983). In this regard, Echegoyen claims that the government had ample time to obtain a telephonic warrant.

For the following reasons, however, it appears that it would have been impractical to require the government to get a warrant here before taking action.

As we have stated, 'obtaining a telephonic warrant is not a simple procedure.' *United States v. Good*, 780 F.2d 773, 775 (9th Cir.), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1523, 89 L.Ed.2d 920 (1986). 'A telephonic warrant may not be obtained simply by calling a magistrate. Among other things, a "duplicate original warrant" must be prepared in writing and read to the magistrate verbatim.' *United State [sic] v. Manfredi*, 722 F.2d 519, 523 (9th Cir. 1983) (citing *United States v. Hackett*, 638 F.2d 1179 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981)).

It appears that the officers, in the instant action, did not attempt to get a warrant. But as the district court's finding of fact indicate, 'the officers did not have the necessary forms' to get a telephonic warrant (*i.e.*, the duplicate original which must be read to the judicial officer). Moreover, given the remoteness of the Tahquitz Road area, the late night hour, and the fact that the officers were approximately forty to forty-five minutes from their station, it is fair to assume that a telephonic warrant would have taken quite some time to secure. In the circumstances here, such a delay could have had dangerous effects. The officers were faced with a potentially serious fire hazard and potentially

> dangerous drug traffickers in an isolated mountain community with little fire and police protection. Under these circumstances, we conclude that 'the delay associated with obtaining a telephonic warrant would have unduly increased the risk . . . that the officers reasonably believed to be [present at] the [Tahquitz Road residence].' *United States v. Good*, 780 F.2d 773, 775 (9th Cir.), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1523, 89 L.Ed.2d 920 (1986). Accordingly, the initial entry was lawful.

In the instant case, Flores not only detected the odor of ether eminating from a barn in a rural area, he noticed that there were lights on in the barn. Further, he was aware that the occupants of the Morales residence had been instructed "not to go near the barn". As he proceeded toward the barn, the chemical smells became more distinctive and more like those asociated [sic] with illicit activities. These smells are not generally found in rural Fresno County at night.

The Court holds that the subsequent activities of the officers were justified, based upon Flores' detection of odors eminating from the barn that he associated with the manufacture of methamphetamine and his visualization of lights within the barn.

The officers in this case were faced with precisely the same factual situation as were the officers in *United States v. Echegoyan, supra*, and they acted accordingly.

DEFENDANT SCHULTZ'S [sic] MOTION TO SUPPRESS THF EVIDENCE SEIZED IN THE WARRANTLESS SEARCH

Counsel for defendant Schultz [sic] first argues that the warrantless search exceeded the scope of the issued warrant. It should be pointed out that the barn was not searched pursuant to the search warrant issued to search the Morales residence. Before the barn was entered and searched, and after it had been made secure so far as danger from explosion and fire were concerned, the officers obtained the consent of both Morales and Schultz [sic] to search the barn. Since the prior discussion indicates that the exigent circumstances justified the initial entries, the Schultz [sic] consent erases any objection that he might have to the subsequent search.

For all of the foregoing reasons, defendant Schultz's [sic] motion to suppress the evidence obtained in the search of the barn is denied.

DATED: December 7, 1988.

/s/ Edward Dean Price
EDWARD DEAN PRICE
United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENVER LEE SHUTZ, Defendant-Appellant.	No. 89-10358 D.C. No. CR-88-0094-EDP MEMORANDUM* (Filed Jan. 9, 1991)

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Submitted December 13, 1990**
Pasadena, California

Before: HUG, BEEZER and BRUNETTI, Circuit Judges.

Defendant-appellant Denver Shutz ("Shutz") appeals his conviction, following a conditional guilty plea, for maintaining a place for the manufacture of methamphetamine, in violation of 21 U.S.C. § 856. Shutz

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

appeals the trial court's denial of his motion to suppress evidence. Specifically, Shutz contends the trial court erred in finding the warrantless search of his barn was justified by exigent circumstances. We affirm.

DISCUSSION

We review the factual findings made by the trial court at a suppression hearing for clear error. *United States v. Feldman*, 788 F.2d 544, 550 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987). The ultimate issue of whether exigent circumstances justify a warrantless search is reviewed under a *de novo* standard. *United States v. Echegoyen*, 799 F.2d 1271, 1277-78 (9th Cir. 1986).

At the outset, we address the Government's contention that Shutz did not enjoy a reasonable expectation of privacy in hiw [sic] own barn. The trial court found that the barn was barricaded on two sides by stacked raisin bins to obstruct access. Occupants of the home on the same property as the barn were told not to go near the barn. Clearly, Shutz exhibited a subjective expectation of privacy. *See United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984). This is an expectation that society would recognize as reasonable. *See id.* Therefore, Shutz' barn and the surrounding curtilage were entitled to Fourth Amendment protection.

The trial court also found that the barn's curtilage extended to, but not beyond the raisin bins surrounding two sides of the barn. We agree. In determining the extent of the curtilage, the relevant inquiry is "whether the area in question is so intimately tied to the home itself that it should be placed under the home 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S.

294, 301 (1987). Shutz went to considerable efforts to reduce access to the barn. The area within this barricade is "intimately tied" to the barn, justifying Fourth Amendment protection. *Id.*

We now address the issue raised by Shutz. He contends the trial court erred in finding that the warrantless search was justified by exigent circumstances. Exigent circumstances are defined as "circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. McConney,* 728 F.2d 1195, 1199 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984). Ether is highly flammable and explosive. If not handled properly and with care, ether can easily ignite causing significant injuries to surrounding individuals and property. Under similar circumstances, we have previously held that the smell of ether in a rural area is a sufficient exigent circumstance to justify a valid warrantless search. *See Echegoyen,* 799 F.2d at 1278-79.

Shutz raises several arguments in attempting to distinguish *Echegoyen* from the present case. We do not find his arguments persuasive. Because the curtilage did not extend beyond the raisin bins, the agent who first approached the barn did not encroach upon Shutz' expectation of privacy. He was validly on the property pursuant to a search warrant. The warrant did not cover the barn, but as Agent Flores rounded the bins, he smelled ether and noticed lights on in the barn. At this point,

given the explosiveness of ether, exigent circumstances justified the warrantless search of the barn.

As in *Echegoyen*, the agents' failure to secure a telephonic warrant prior to the search did not mitigate the exigency nor the validity of the search. *See id.* at 1279-80. The evidence indicates the agents were first concerned with making the area safe. They entered the barn to ensure no one else was present inside, questioned codefendant Lowe regarding the ether and danger posed, and called the fire safety authorities. Only after the barn was declared safe did the agents enter the barn with an eye toward seizing incriminating evidence, and this was done with the consent of Shutz.

In conclusion, we find that the trial court's findings of fact were not clearly erroneous. Upon *de novo* examination, we conclude that exigent circumstances existed justifying the warrantless search of the barn when the trained narcotics agent smelled ether and saw lights and movement inconsistent with the usual activities that would take place in a barn in a rural area.

AFFIRMED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENVER LEE SHUTZ, Defendant-Appellant.	No. 89-10358 D.C. No. CR-88-0094-EDP ORDER (Filed Oct. 24, 1991)

Appeal from the United States District Court
for the Eastern District of California

Before: HUG, BEEZER and BRUNETTI, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing filed by appellant on January 24, 1991.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.